THE CONSTITUTION AND THE COURTS.

THE purpose of these pages is to offer certain comments and criticisms concerning current propositions for changing the manner by which laws may, or may not, be held unconstitutional by the courts, and in particular concerning the proposition popularly but inaccurately named the recall of judicial decisions; and finally to offer certain counter propositions concerning the same subject matter.

At the start I say frankly that the comments and criticisms are offered in a friendly spirit; for I feel convinced that there is much of truth in the reasons adduced to show the need of some change. I have, however, attempted to approach the subject with a view not only to the general public welfare but to the welfare and integrity of the courts, believing, as I do, that the two cannot well be kept separate.

There appear to have arisen in various parts of the country growing unrest and discontent with the judiciary, which have taken shape in a number of states, where judges are elected by popular vote, in proposals for the recall of judges by the same popular vote. The causes of this state of things are beyond the scope of this inquiry except in so far as they concern the power of the courts to hold laws unconstitutional; but there appears to be little doubt that decisions of courts, holding unconstitutional acts of the legislatures, have contributed to this discontent.

Many of these decisions have occurred in states blessed with constitutions which violate every first principle of what a constitution should be, and, instead of containing only a few fundamental principles, resemble more nearly volumes of general laws.[2] It is no wonder that the people of those states, after placing them-

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[1] This paper was privately circulated in January of the current year, as bearing upon the political situation in New England, and with particular reference to Massachusetts. The references in the notes are taken mainly from United States and Massachusetts decisions, and are intended to be merely illustrative rather than compendious.

[2] Specific reference is omitted, not for lack of material, but because I have no desire to be unnecessarily invidious.

selves in legislative strait-jackets, are annoyed at the result. Their troubles, however, must be regarded as local, and will not here be further considered.

Decisions under those constitutions, however, are not the only ones which have caused trouble. There are few jurisdictions in which comment, or even agitation, has not been caused by the setting aside of some law desired by a considerable part of the community; and the cry is raised that the popular will has been frustrated, that the machinery for constitutional amendment is vexatious, cumbersome, and long; and that there is great difficulty in framing an apt amendment.

In the Spring of 1912 Colonel Roosevelt first proposed the so-called recall of decisions. That doctrine has since appeared and been developed in various forms, has been much misrepresented, and much abused. But it is a somewhat curious fact that in the East Colonel Roosevelt has been given little credit for his sagacity, all the more remarkable in a layman, in discerning that among the various reasons urged for the recall of judges, there existed a separate and distinct evil, reflecting not so much upon the judge as upon the body of the law itself, and requiring a remedy which should operate upon the law itself.

Before taking up the several forms of this particular remedy, I wish to emphasize the point that mere fault in one remedy does not excuse us from making an honest scientific attempt to find a better one. The part of many a public servant ends with pointing out an evil, and with indicating a desired result, which if reached will obviate the evil; and in such case the lawyer should assist to reach that result in rational forms of law, and should aid by a scientific analysis and suggestive, constructive treatment.[3]

I.

The first form in which I shall consider the proposed remedy is at once the simplest and the broadest, the form in which it

[3] We should bear in mind that Colonel Roosevelt himself frankly disclaims any undue allegiance to the specific remedy in any particular form, and that the occasional approach to fanaticism on the subject has been mainly on the part of his lay disciples.

was most widely advocated on the stump, and in which it has been formally presented for legislative action in Colorado and Massachusetts.[4]

In that form the proposal is, briefly, that after any decision of the state court holding a state law invalid because in conflict with any provision of the state constitution, then, either upon petition by a certain number of voters or by resolve of the next general court, the act in question shall be referred to the people, and, if accepted by the people, shall thereafter have the force and effect of law.[5]

This sweeping proposition seems objectionable. In its application to certain broad provisions, such as the due process of law clause, its effect will be hereafter considered in connection with the second form in which the remedy is presented; but the present form is not limited in its effect, and must stand or fall according to its effect upon the constitution as a whole.

Many decisions under the constitution depend upon a pure matter of construction of specific constitutional provisions;[6] and in pure matters of construction the courts exercise an essentially judicial function. When in such a case a clause has been judicially construed, the placing of a particular law outside of that construction tends to inequalities in the law repugnant to the fundamental theory of a government of laws, by which a particular principle of government should be capable of application to all classes of the community. The principle on which a new law is advocated should be statable in terms of a major premise, that is, in the form of a more or less general proposition, and, if it is not so statable, a strong presumption against the proposed law at once

[4] In justice to those in charge of the measure presented to the Massachusetts legislature of 1913 (House Bill No. 1243) it should be stated that the measure was urged as tentative in form, and for the purpose of opening the question.

[5] It should be borne in mind that in no form in which the proposed remedy has been advocated has it been suggested that the decision of a court in a particular case be reviewed or reversed by popular vote. It has merely been suggested that a decision against a law shall furnish a basis for a popular vote which shall have the effect, for the future, of confirming and validating the law.

[6] For example, the decision of the Supreme Court of the United States that an income tax is a direct tax, Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601 (1895); and the decision of the Supreme Judicial Court of Massachusetts that a succession tax is an excise rather than a tax upon property. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512 (1894).

arises. And if this presumption is overcome, it is perfectly possible under the present law to amend the constitution in a specific manner, so as expressly to permit a certain class of legislation.

The proposed method, moreover, very deftly evades placing itself upon either one of two horns of a dilemma. It is by no means clear whether a law when validated by popular vote becomes law outside of and *non obstante* the constitution, or whether the popular vote is regarded as a back-handed interpretation of the constitution.

If the former view is intended, then an anomalous body of laws will grow up, which are neither fish nor flesh, neither mere law nor yet a part of the constitution; and embarrassing questions will arise as to how far such laws may be added to or amended by mere legislative authority. Under this view, moreover, the constitution becomes a mere temporary check upon hasty legislation, like the House of Lords in England. Checks for delay may be a perfectly proper means of accomplishing a quasi-constitutional safeguard, but a written constitution based on reason and containing principles regarded as fundamental truth cannot be so used. Truth of this nature does not change by lapse of time; and a constitutional safeguard, phrased in terms of reason, should be removed, if at all, in terms of reason.

If the latter view is intended, that the people have interpreted the constitution, the obvious answer is that they have done no such thing. They have voted for the law; they cannot be fairly supposed to have reviewed the reasoning, often highly technical and historical, by which the court reached its decision. And if their vote be regarded as an interpretation, it will stand as a precedent for future decisions; and future courts will be placed in the impossible position of having to consider and apply a precedent, inconsistent with other precedents, for which no reasons are furnished, and for which the courts must grope backward in the dark in a blind search for possible premises.

These difficulties hardly comport with the maintenance of an orderly system and rational body of law, which may be of as great public importance as the immediate accomplishment of a particular desirable legislative result.

II.

The second form in which the proposed remedy is presented is that advocated by Colonel Roosevelt in his speech at Carnegie Hall, and expounded and developed by Mr. William L. Ransom of the New York bar.[7]

"I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law — which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion — be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people." [8]

Before considering the remedy presented in this form, it is important to analyze, so far as it is capable of analysis, the judicial function in its various aspects, first, as exercised in the ordinary case, and second, as exercised and developed with reference to constitutional questions.

The judicial function in England was long almost indistinguishable from the legislative function; and even after courts had assumed a fairly definite judicial character, both functions continued to be exercised without conscious distinction by the Parliament or the Council.[9] By the time of the American Revolution a substantial separation of these functions had been accomplished, but this separation was, at best, only approximate.[10]

In American constitutions an attempt was made to follow the dogma made current by Montesquieu in his Esprit des Lois by effecting a complete separation of powers;[11] and while such a

[7] Ransom, Majority Rule and the Judiciary.

[8] *Id.*, p. 114.

[9] McIlwain, The High Court of Parliament and its Supremacy, especially chapters 3 and 4; Pollock, First Book of Jurisprudence, 348–349; Maitland, Constitutional History, 20, 105, 136, 218; Gneist, English Parliament (Shee's translation), 16, 17, 116–122; Hale, Jurisdiction of the Lord's House (Hargrave's ed. 1796), 4, 26, 32, 38, 68, 84–86, 103.

[10] The House of Lords is still the highest Court of Appeal.

[11] Montesquieu, De l'Esprit des Lois, Geneva, 1749, 242–244; McIlwain, 322, 323.

separation was in the main accomplished, it has always been recognized that it has been in some respects inexact.[12]

In its simplest form, the judicial function consists in declaring the law and applying it to the facts.[13] Facts, in the main, are settled by the jury. Certain other facts are determined by the court, as in construing statutes or deciding on admissibility of evidence; and in certain cases, such as equity cases, the court takes the place of the jury as a tribunal of fact. But in the main the distinction between law and fact is preserved.[14]

In declaring the law, two kinds of law are encountered, the common law and the statute law.

The common law is unwritten. In declaring or extending the common law the court theoretically acts only upon principles already established, while the legislature may adopt new principles; and yet when the court develops or extends the common law the line between judicial and legislative action becomes almost indistinguishable.[15]

In the construction of statutes, often the matter resolves itself into the purely technical construction of a document. On the other hand, facts bearing upon the probable intent of the legislature are often considered,[16] and in such cases again the line between judicial and legislative action becomes blurred.

In all of these cases, erroneous decisions of the facts at issue between the parties bear only on the individual litigants, and erroneous declarations of the common or statute law, — even where the court has in effect invaded the province of the legislature — may be readily corrected by another legislature.

With the advent of the American constitutions, there was added to the judicial function a high prerogative involving new and unprecedented responsibilities, — the power of the court to disregard

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[12] Dicey, Law of the Constitution, Chapter XII; The Federalist, No. 47. See Pound, Legislation as a Social Function, which, by courtesy of the author, I have consulted in manuscript, and which is to appear in the American Journal of Sociology.

[13] Thayer, Preliminary Treatise on Evidence, 183.

[14] *Id.*, Chapter V.

[15] Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 227 (1908); Holmes, Common Law, 35, 36.

[16] Thayer, Preliminary Treatise, 216.

acts of the legislature, a coördinate member of the body politic, for violation of the fundamental law.[17]

It is foreign to my present purpose to enter upon the pros and cons of the question now being so fully discussed, whether it was originally rightly decided that the courts have this power. Adequate discussion on both sides is elsewhere available;[18] although, of course, much that is being said by those cheerful optimists, mostly laymen, who airily assume that Chief Justice Marshall,[19] Chief Justice Shaw[20] and the other great judges could not rationally have held the opinions which they announced in favor of this power in the courts, is negligible in any serious discussion. I myself hold that the question was rightly decided; but I maintain on the other hand that there is much to be said on either side,[21] and that in any event the exercise of this high prerogative is not necessarily a judicial function; and I regard with little sympathy the views of those legal formalists who insist that any change, even a partial one, would necessarily be fatal to our existence as a free country. I hold that it is better that the constitution should bend, if thereby its substance may be retained, rather than break under too great a strain.

The position of the courts, moreover, in dealing with constitutional questions differs from that of the typical judicial body not only with respect to their high prerogative of disregarding acts of a legislative body, but with respect to matters of detail in the exercise of that prerogative.

Upon pure questions of technical construction, it is true, their functions differ but slightly from the ordinary judicial function of construing a deed, will or other document. But the more fundamen-

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[17] Thayer, Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 130.

[18] Marbury *v.* Madison, 1 Cranch (U. S.) 137 (1803); Eakin *v.* Raub, 12 S. & R. (Pa.) 330 (1825), and especially the able dissenting opinion of Mr. Justice Gibson; Norwich *v.* County Commissioners of Hampshire, 13 Pick. (Mass.) 60 (1833). See Coxe, Judicial Power and Unconstitutional Legislation, 219–271; Beard, The Supreme Court and The Constitution; McLaughlin, The Courts, The Constitution and Parties; Dougherty, Power of Federal Judiciary over Legislation.

[19] Marbury *v.* Madison, 1 Cranch (U. S.) 137 (1803).

[20] Norwich *v.* County Commissioners of Hampshire, 13 Pick. (Mass.) 60 (1833).

[21] Coxe, Judicial Power and Unconstitutional Legislation, 270, 271; Thayer, Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 130.

tal questions are not simple questions of construction. The guaranties of fundamental rights are phrased in broad general terms, and their application in a given case often depends not only upon the facts proved as between the parties to the litigation but upon the facts and conditions of social, economic and political import, while the very breadth of the provisions in question leads more readily to decisions in that borderland where the boundary between the judicial and the legislative is lost in shadow.

The consequences of error, also, are vastly more serious. If a court errs with respect to a statute, or unduly extends the common law, only the individual litigant is harmed, and it is a simple step for the legislature to mend the matter. If on the other hand the court errs in its interpretation of the constitution, only the cumbersome process of amendment can cure the wrong, and in the meantime the entire commonwealth is harmed. Decisions upon constitutional questions have a dual significance. They not only settle the particular controversy between the parties, but also as a practical matter settle the status, as to validity, of the law in question for the whole state and for all time. Although this second aspect of decisions is now left to inference, it is seldom in practice questioned.[22]

I propose now to analyze with a little further particularity the workings of the judicial functions as developed in the United States with respect to the more fundamental constitutional questions. I shall take as my main thesis the judicial treatment of that broad general limitation upon legislative authority which in some form is common to most of the state constitutions, — the provision that no one may be deprived of life, liberty, or property without due process of law.[23] And I wish to make it clear that my primary concern is with state courts and state constitutions. While the most instructive statements of the law are often to be derived

[22] The possibility that an act, when once held unconstitutional, may not be invalid for all time and under all circumstances, is not very often taken into account. For an interesting exception to this general attitude, see Nebraska Telephone Co. *v.* Cornell, 59 Neb. 737, 749 (1900).

[23] See Constitution of Massachusetts, Part I, Articles X and XII; Part II, Chapter 1, Section 1, Article IV.

from the federal decisions, I am not now directly concerned with the rather peculiar position of the Supreme Court of the United States, which, in dealing with acts of Congress, is dealing with a body possessing only limited powers, and, in dealing with the legislatures of the states touching the Constitution of the United States, is exercising a paramount authority of supervision, and, if necessary, of censorship. My present concern is with the case of a single state or sovereignty, having a written constitution of its own, and co-ördinate legislative and judicial departments.

The development of the attitude of the courts toward questions of what is due process of law,[24] and the gradual change in the manner in which such questions are presented, have been to a high degree significant.

The first impulse of the judges was to treat such and indeed all other constitutional questions as pure questions of strict construction of two written instruments, one a constitution, and the other a statute; and where the latter conflicted with the former it had to give way. This view ignored the fact already referred to that in the exercise of a power of such magnitude and of such public significance, the court was acting, though judicially in form, yet in substance as a part of the political system, and determining questions which were in reality political and governmental. Chief Justice Marshall early recognized this situation, and pointed out that courts must remember that "it is a constitution we are expounding." [25] And gradually, though by halting steps, it became recognized as an administrative rule, that the courts should not assume to review the wisdom of legislative action, or pass upon the facts which actuated such action; and that the action of the legislature should be supported unless it clearly and unmistakably exceeded the limitations of the constitution.[26] A more consistent adherence to this rule would doubtless have done much to prevent the current agitation.

In dealing with the question of due process of law, the courts

[24] That question first arose only in the state courts, although under the Fifth Amendment the federal courts occasionally had the same question to decide with respect to acts of Congress. With the adoption of the Fourteenth Amendment after the Civil War began the long line of decisions on the subject in the federal courts.

[25] M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 407 (1819).

[26] Thayer, Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 130.

early recognized that due process was not necessarily confined to judicial process, but might consist of any of the recognized forms of legislative action.[27] The cases considering the question whether legislative action is or is not due process of law, I shall not be audacious or didactic enough to attempt to classify in an exhaustive manner, but the following generalizations will be found to be roughly true.

Many of the cases find a touchstone, with which to solve all difficulties, in the phrase "the police power." Whatever is an exercise of the police power is due process of law. Discussions and attempted definitions of the phrase, however, are unsatisfactory, because of its loose use in a variety of different connections.[28] As used in connection with due process of law, it is either a question-begging phrase synonymous with that broad general power of a legislature to establish all manner of laws for the general good within some vague and undefined limit,[29] or else a "conciliatory" [30] phrase used to cover up some slight apparent overstepping of the boundaries fixed by that limit.

What that limit was long remained undefined. The earlier cases deal in the main with historical investigation into the commonly accepted objects of legislation; and if it were found that the object, and also the fashion and manner of legislation, had the sanction of usage, that generally settled the question.[31] Little attention was paid to the reasonableness of the legislation in question, although many expressions may doubtless be found in which the reasonableness of a law, which is held valid, is pointed out.

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[27] Murray's Lessee *v.* Hoboken Land & Improvement Co., 18 How. (U. S.) 272, 281 (1855); Burnham *v.* Webster, 5 Mass. 265 (1809); Vinton *v.* Welsh, 9 Pick. (Mass.) 87 (1829); Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, 85 (1851).

[28] Thayer, Cases on Constitutional Law, 693, note, 742, note.

[29] Mugler *v.* Kansas, 123 U. S. 623 (1887); Thorpe *v.* Rutland & Burlington R. Co., 27 Vt. 140 (1854); Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, 85 (1851).

[30] I borrow the familiar comment of Mr. Justice Holmes. See Lawton *v.* Steele, 152 U. S. 133 (1894); Danforth *v.* Groton Water Co., 178 Mass. 472, 476, 477, 59 N. E. 1033 (1901); Dunbar *v.* Boston & Providence R. Co., 181 Mass. 383, 63 N. E. 916 (1902).

[31] Murray's Lessee *v.* Hoboken Land & Improvement Co., 18 How. (U. S.) 272, 281 (1855); Commonwealth *v.* Bailey, 13 Allen (Mass.) 541 (1866); Commonwealth *v.* Alger, 7 Cush. (Mass.) 53 (1851); Commonwealth *v.* Blackington, 24 Pick. (Mass.) 352 (1837); Commonwealth *v.* Badlam, 9 Pick. (Mass.) 362 (1830); Head *v.* Amoskeag Mfg. Co., 113 U. S. 9 (1885).

Gradually the voice from the past became fainter in answer to these questions, and it became necessary to consider objects of legislation not so much from the point of view of justification by usage, as from the point of view of justification by the public importance of the object.[32]

In like manner the fashion and manner of legislation underwent a change. New and unprecedented forms of legislation appeared, in which justification by usage became increasingly difficult. At first it was deemed a somewhat radical concession to hold that these new fashions might be employed provided they "regard and preserve the principles of liberty and justice."[33] In attempting to define the limits much loose phraseology may be found which in reality begs the question;[34] but, in general, the test has now been firmly established, that such legislation must not be "absolute and despotic," must not be *arbitrary*.[35]

The decisions of the future, therefore, upon questions of due process of law will resolve themselves under three heads:

1. Is the act for a public purpose or object?
2. Is it adapted to the purpose?
3. If the act is for a public purpose, and is adapted to the purpose, is it arbitrary in its effect upon persons and property?

The real significance of this gradual change, from the public and political standpoint, lies in the fact that, while in the past questions of this general character have been decided largely upon history, usage, precedent, and authority, — a proceeding well calculated to be properly dealt with by the judicial temper, and not differing widely from the strictly judicial questions — now these questions must be more and more decided by passing in review the same public and political questions with which the legislature itself has dealt;[36] and the cases must often be decided upon in-

[32] Budd *v.* New York, 143 U. S. 517 (1892).

[33] Hurtado *v.* California, 110 U. S. 516, 535, 536 (1884).

[34] Booth *v.* Illinois, 184 U. S. 425, 429 (1902); Lochner *v.* New York, 198 U. S. 45 (1905).

[35] This is true at least of the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts. Noble State Bank *v.* Haskell, 219 U. S. 104, 111 (1911); Twining *v.* New Jersey, 211 U. S. 78, 100, 101 (1908); J. P. Squire & Co. *v.* Tellier, 185 Mass. 18, 69 N. E. 312 (1904); Commonwealth *v.* Pear, 183 Mass. 242, 247, 248, 66 N. E. 719, 721, 722 (1903); Opinion of the Justices, 163 Mass. 589, 40 N. E. 713 (1895).

[36] See Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 227 (1908).

sufficient premises, and without adequate machinery for determining the public facts. And by "public facts" I mean those facts in which the public is interested, from which the legislature must have drawn the inference that the law in question would subserve the general welfare of the community, — facts most of which are not now even admissible in evidence before the court,[37] and must be considered, if at all, by being judicially noticed.[38]

Yet it is with respect to decisions of this class, dealing with the three questions enumerated above, that the most serious criticism has arisen. The cases most often cited, — cases in which state laws have been held invalid limiting the hours of labor of women in factories,[39] limiting the hours of labor of employees in bakeries,[40] forbidding the manufacture of cigars in tenement houses,[41] or establishing a system of compensation at fixed rates for employees injured in the course of their employment,[42] — hold that the law in question either did not serve a permissible public purpose or was arbitrary in its effect upon personal liberty or property.[43] And it is with respect to this class of cases that the proposed remedy is urged.

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[37] Jacobson *v.* Massachusetts, 197 U. S. 11, 30, 36 (1905); Commonwealth *v.* Sisson, 189 Mass. 247, 252, 75 N. E. 619, 621 (1905); Commonwealth *v.* Pear, 183 Mass. 242, 246, 247, 66 N. E. 719, 721 (1903).

[38] Thayer, Preliminary Treatise, 301, 304; Pound, Liberty of Contract, Yale Law Journal, May, 1909.

[39] People *v.* Williams, 189 N. Y. 131, 81 N. E. 778 (1907).

[40] Lochner *v.* New York, 198 U. S. 45 (1905).

[41] Matter of Jacobs, 98 N. Y. 98 (1885).

[42] Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431 (1911).

[43] It seems probable in the foregoing cases that while the Supreme Court of the United States merely failed to apply the modern definition of due process of law, the New York Court of Appeals has not fully accepted it. Where this is so, courts will have to be furnished with a new definition by constitutional amendment.

Instances of comparatively recent Massachusetts cases falling within the general class of decisions referred to in the text, in which laws have been held unconstitutional, are the following: Durgin *v.* Minot, 203 Mass. 26, 89 N. E. 144 (1909); Wyeth *v.* Cambridge Board of Health, 200 Mass. 474, 86 N. E. 925 (1909); O'Keeffe *v.* Somerville, 190 Mass. 110, 76 N. E. 457 (1906); Attorney-General *v.* Boston & Albany R. Co., 160 Mass. 62, 35 N. E. 252 (1893); Opinions of the Justices, 211 Mass. 618, 98 N. E. 337 (1912); 208 Mass. 607, 94 N. E. 848 (1911); 208 Mass. 619, 623, 94 N. E. 1044 (1911) *semble;* 207 Mass. 601, 94 N. E. 558 (1911). There are very few instances in which this court has blocked industrial legislation. See Opinion of the Justices, 209 Mass. 607, 96 N. E. 308 (1911); Mutual Loan Co. *v.* Martell, 200 Mass. 482, 86 N. E. 916 (1909); Commonwealth *v.* Interstate Consolidated Street Ry. Co., 187 Mass. 436, 73 N. E. 530 (1905); Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383 (1876).

Taking up these classes of decisions in order of the three subdivisions above noted, we find that the first, decisions that the purpose is not a recognized public purpose, turn upon a pure question of fact, a fact of high political and public import, to be sure, but none the less a fact. And this fact, when decided, has place as a part of the body of constitutional law no more necessarily than has the verdict of a jury in the ordinary case.

The second class of decisions, that the act of the legislature is not adapted to the ostensible purpose, finds few instances in the reports of the more enlightened of our state courts. Such decisions may have a place in the courts of the United States, which are charged with the added burden of seeing to it that state legislatures do not evade the federal Constitution; but as between the coördinate judicial and legislative departments of a single sovereign state, the courts very properly decline to impugn the motives, or, to this extent, to doubt the intelligence of the legislature, when the legislature deems a means in some measure adapted to an end.

The third class of decisions, in which courts assume to set aside acts of the legislature on the ground that in their effect upon individual rights they are arbitrary, turn upon mixed public and private facts,—public facts so far as the public welfare is concerned, private facts so far as the effect upon the individual is concerned.

The public facts are often matters of inference. The question for the court is often stated to be, whether a state of public facts could possibly exist which would warrant the action of the legislature.[44] But the question as to the possible existence of facts involves of necessity a familiarity with, and an inquiry into, actual facts and conditions;[45] and, finally, the ultimate decision depends upon the weighing of these two sets of facts, one against the other — on the one hand the private facts which have been brought to light, and, on the other hand, all the actual or potential public facts[46] — and upon the determination whether the legislature, weighing all the facts, could within the bounds of reason have reached the deliberate judgment that individual interest should be sacrificed to the public welfare to the extent required by the act in question.

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[44] Munn *v.* Illinois, 94 U. S. 113, 132 (1876).

[45] Commonwealth *v.* Interstate Consolidated St. Ry. Co., 187 Mass. 436, 440, 73 N. E. 530, 532 (1905).

[46] Mutual Loan Co. *v.* Martell, 200 Mass. 482, 484, 86 N. E. 916, 917 (1909).

This final decision, as is recognized by the more acute and intellectually honest of the judges, is largely a question of degree,[47] a question of how far individual harm could be inflicted for the particular public benefit without being deemed arbitrary; and this question, although complex, is a question of fact.

An error on the part of the court in any one of the foregoing classes of decisions is clearly an error in matter of fact. If it affected merely one individual we might well say, let him grin and bear it, as in the case of an erroneous verdict of a jury. But the practical effect, as has been said, harms the entire commonwealth.

The only remedy at present afforded is by constitutional amendment. Yet the trouble is not with any provision of the constitution, but rather with the determination of the facts and conclusions of fact to which the provisions of the constitution are applied. And under guise of law, there have crept into the law reports pages and pages of what is in reality mere discussion and determination of facts by the court, which strictly do not belong in the body of the law at all.[48] Yet these decisions of fact, often based upon matters which the court has felt obliged to find out about as best it could under the doctrine of judicial notice — a doctrine very useful at common law, but never meant to stand so great a strain — are treated as if they formed a part of the law of the land, and are regarded as binding authority for subsequent similar decisions. And the worst of it is that these decisions of fact are to a great extent based upon a very vigorous, individualistic view of the philosophy of government, in which the emphasis as between private rights and the public welfare does not accord with the emphasis of the present day. Under these circumstances, greater facility in the method of amending the constitution would avail nothing. The fact that no way exists by which the misapplication of a broad general provision of the constitution to the facts may be corrected, except by amendment of the provision itself, is a grave defect in our system of constitutional law.

Granted the existence of a defect, however, the question of the remedy is fraught with difficulty. To the historian who considers the well-nigh extraordinary, even though sometimes illogical, man-

[47] Martin *v.* District of Columbia, 205 U. S. 135, 139 (1907).

[48] See Thayer, Preliminary Treatise, 215, 247; Pound, Liberty of Contract, Yale Law Journal, May, 1909; Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 227 (1908).

ner with which Anglo-Saxon institutions have in the long run adapted themselves to changing conditions, to the philosopher, in whose eyes time is at best merely relative, there are strong grounds for the hope that relief will come through the inevitable, even if slow, response of the courts to public opinion. This response is certain in the end; it is only in times of stress and of rapidly changing public opinion that the response for the moment seems to be laggard.

A defect in existing machinery may be of a nature such as to become apparent only in times of stress, when the machinery is under high pressure, and perhaps is overtaxed. And we should do well to pause before we add a new piece of mechanism, until we are certain that it is necessary, and until we are certain that the new mechanism will not in a manner unforeseen throw out of adjustment the old machinery in respects in which it is working well.

We must not forget, too, that, in times past, the courts and the constitution have often safeguarded human rights against oppression. We must not forget that, in the present, the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts, at all events, have, with few exceptions, taken an enlightened position with regard to the broad scope of the legislative authority, and that the liberal spirit in those courts and in others is, on the whole, increasing.

Yet it may well be true that the time has come in which the defect which has been pointed out must be remedied, and, if so, it is important to choose the remedy with circumspection.

We may now consider Colonel Roosevelt's suggestion, already quoted, as presented in the second form.

The first obvious comment is that it does not touch, or purport to touch, court decisions in their first aspect, as settling the particular controversy between the parties. Doubtless in this aspect the interest of the public is less directly affected; but if there is a defect in the present system, and the defect can be cured, the individual litigants should share in the cure, and the courts should, as far as possible, be protected from being placed in the position of having a decision, which in its private aspect is final, shown to be erroneous by being corrected in its public aspect.

We now turn to the proposed remedy as applied to decisions in their public aspect, and in particular to the subdivisions of decisions under the due process of law clause as analyzed above.

As applied to the first of the three classes of decisions, I see little theoretical objection to the plan and much to commend it. The question whether, for instance, legislation in aid of the rebuilding of Boston after the great fire,[49] or legislation permitting the establishment of municipal fuel yards,[50] was for a public purpose, was a pure question of public fact which might well have been determined by the ballots of all the voters of the commonwealth.

The serious practical objection to the plan is that many people not only fail to understand it, but interpret it as meaning something else and something gravely objectionable. It is no reproach to the average voter to say that he is not familiar with nice technical distinctions in the details of government, and he is in real danger of being allowed to suppose that the plan involves the submission to popular vote of the decision by the court of the particular case. It is all very well to argue to a lawyer that only the future status of the law in question is involved, that the people are to deal only with the second aspect of the case which now is determined by the court only by inference, and that in substance the proposed plan is merely to limit the power of the court in this class of cases to a power to suspend until the people can vote. A layman who fails to grasp these distinctions is not necessarily either stupid or uneducated. Even if the plan were rephrased, and it should be urged that in the class of cases depending merely upon public fact the power of the courts should be limited to the power to suspend a law until further legislative action, it would be difficult to explain why this does not amount to subjecting the courts to reversal, or why their decisions should be final in one class of cases and not in another. The practical danger lies in what the plan suggests, and in what it is too often supposed to mean.

With respect to that class of cases in which acts of the legislature are set aside on the ground that in their effect upon individual rights they are arbitrary, there seem to be still further objections to the plan proposed, which require consideration.

Up to a certain point, undoubtedly, reason supports the proposed

[49] Lowell *v.* Boston, 111 Mass. 454 (1873).

[50] Opinion of the Justices, 182 Mass. 605 (1903).

remedy. This class of cases is the one which causes the gravest disquiet to the student of law and government from the point of view not only of the common weal but of the integrity and dignity of the court itself. The function performed by the courts in this class of cases has been already described; but there are grounds for the belief that they impose burdens upon the courts too grievous to be borne. I do not mean to say that these functions are not proper judicial functions. They are, in fact, essentially similar to functions every day performed by courts in the construction of statutes.[51] The consequences, however, are so vast and the public and political import so overwhelming, that it may well be wiser to place the responsibility of decision either upon the people or at least upon a more responsive and more directly accountable political body.

Have we not, in short, reached the breaking point in the power of the courts to gainsay the legislatures? When an essentially modern question is before them, with no aid from historic usage and authority, when they are called upon to determine whether in the light of all the facts, private and public, social and economic, facts which are within the peculiar knowledge of the legislature, and of which the courts have only limited sources of information, is it fair that they should be expected to decide that ultimate question of degree which lies between the rational and the arbitrary in legislative action?

In dealing with new and unprecedented social and economic

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[51] Even in the construction of statutes, courts have occasionally recognized their difficulties, and we find instances in which they have taken advisory opinions from juries in matters of fact. Thayer, Preliminary Treatise, 215, 216, 259–262; Commonwealth *v.* Wright, 137 Mass. 250 (1884); Commonwealth *v.* Sullivan, 146 Mass. 142, 145, 15 N. E. 491, 494 (1888). And in cases under the constitution there are instances in which courts have taken advisory opinions of the jury. Postal Telegraph & Cable Co. *v.* New Hope, 192 U. S. 55 (1904); 202 Pa. St. 532, 52 Atl. 127 (1902).

Compare also the doctrine held in some jurisdictions that the question whether an act of the legislature has been enacted in accordance with constitutional requirements is a question of fact to be determined upon all the evidence. State *v.* M and, 18 Neb. 236, 25 N. W. 77 (1885); Webster *v.* Hastings, 56 Neb. 669, 673, 675, 77 N. W. 127, 129 (1898).

Compare also the willingness of the Supreme Court of the United States to treat the question of the reasonableness of the rentals charged by a city for the locations of interstate telegraph poles as a question of fact for the jury. Atlantic & Pacific Telegraph Co. *v.* Philadelphia, 190 U. S. 160 (1903).

questions and current opinions, moreover, it is only human for an honest and upright but conservative thinker to see nothing but danger and despotism in the manner of thought of, and the measures advocated by, his more liberal neighbor, and it requires on the part of a judge the highest degree of analytic acumen and intellectual honesty to concede to others that latitude of opinion within the bounds of the rational which is absolutely necessary before he can rightly decide the highly artificial question which he is now compelled to decide.

It is not every judge who can not only believe but live up to the following creed:

"A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." [52]

Firmly as I believe in the importance of the judges maintaining a sympathetic attitude towards predominant public opinion, I do not believe in subjecting an honest and upright judge to undue attack merely because he happens to be by temperament either a conservative or a liberal. He should be criticized fully, fairly, and freely if his reasoning does not commend itself, but he should be protected from ill-considered abuse merely because the result of his decision is unpopular, — a practice no better than any other form of the time-honored and unsportsmanlike game of throwing bricks at the umpire, — and should be relieved of burdens which bear upon him with undue severity. For, after all, the weight, authority, and good name of the courts throughout the community are among the most important safeguards of human rights in any civilized state.

In the class of cases now under consideration, where the question turns upon the decision whether the legislature has acted within the bounds of reason, what can written safeguards do beyond insuring to the persons aggrieved an opportunity to present the ex-

[52] Dissenting opinion of Mr. Justice Holmes in Lochner *v.* New York, 198 U. S. 45, 75, 76 (1905).

tent of their injuries as shown by actual experience in an orderly and complete fashion, and then, when opportunity for due deliberation and sober judgment has been afforded, placing the responsibility for the final decision of that ultimate question of degree upon the legislative department?

All that can be required under these circumstances finally to establish a law is another confirmatory act of the legislative authority. And this, as I understand it, is what will be accomplished by the popular vote held under the plan proposed; the people, after the fashion of direct legislation, will pronounce the final legislative fiat.

At this point, however, I doubt the wisdom of this immediate vote of the people. The question is merely a question of direct legislation. The final fiat, although legislative, will be of a highly deliberative character, quite different from the determination of one simple fact. The essence of the constitutional guaranty is a full and fair consideration of the case of the individuals aggrieved before a deliberative body, and a careful weighing of the private facts against the public facts before final action. Even if a popular vote is ultimately to be had, I doubt if the proceedings before a court of justice are of a popular character such as to prepare the public mind for an immediate direct vote; and there would be grave danger that the case would go before the people upon the public facts without sufficient consideration of the private facts. Nor do I think it healthy either for the courts or for the community that a judicial inquiry should be used for this preliminary legislative purpose.

III.

As an alternative remedy, I wish tentatively to suggest the following, which in some respects may be less open to objection than the other, but which nevertheless may prove equally effective in curing the evils which have been pointed out.

Let there be established [53] a tribunal composed of experts trained in matters of government and sociology, which shall perform for the courts a service analogous to that performed for the legislature

[53] By constitutional amendment, if necessary.

of Wisconsin by Dr. McCarthy's legislative bureau,[54] but which shall have in addition certain mixed functions, in part judicial and in part legislative.[55]

To this new body the courts may refer the question whether an act passed by the legislature for a proper purpose is arbitrary in its effect upon individual rights. Not only the individual, but all other persons interested, may present evidence and be heard, the attorney-general shall represent the commonwealth, and the tribunal may consider all manner of evidence and make further investigation on its own initiative.

The decision of the new body, certified to the court, will furnish the basis of decision for the particular case, and, if against the law, will suspend it for a certain length of time, or in any event until further action by the legislature.

The new body will also be required to report its findings to the legislature, together with any recommendations which it may see fit to make; and, if any act reported to be arbitrary shall thereafter be reaffirmed without change by the legislative authority, it shall take effect as law.

To this same tribunal I suggest referring, as to a jury, the public fact in the first class of cases above referred to, whether an act passed by the legislature is for a public purpose; and the tribunal will in like manner report to the court, as a basis for the decision of the particular case, and to the legislature.

The tribunal thus created, as has been already intimated, would act in a dual capacity.

In its quasi-judicial capacity it would aid the courts in the decision of the particular case in its first aspect, — that of settling

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[54] See Jones, Statute Law Making, 20–25; Report of Librarian of Congress, April, 1911, Legislative Reference Bureaus; Pound, Legislation as a Social Function, above referred to, and to appear in the American Journal of Sociology.

Professor Pound also points out, in Scope and Purposes of Sociological Jurisprudence, 25 HARV. L. REV. 514, the particular importance of studying laws in "their social operation, and the effects which they produce, if any, when put in action."

Compare also the administrative department of the Municipal Court of Chicago, and the suggestions made in the Fifth Report of that court.

[55] How this body shall be elected or appointed, whether it shall be a permanent board, or appointed, as a jury is empanelled, for each particular case, and whether, if a permanent board, it would have work enough to do to occupy its time unless consolidated with a body having other functions, such as a legislative reference bureau, are questions of detail with which I do not here attempt to deal.

the controversy between the parties. It would do so by weighing the public facts and conclusions of fact necessary to the decision; it would be, in effect, a tribunal of public facts.

In its quasi-legislative capacity it would aid in the decision of the case in its second aspect, — that of determining the status, as to validity, of the law in question in its future effect upon the whole public, and the effect of the decision in this second aspect would no longer be left to inference. A finding that a law was arbitrary, or did not serve a public purpose, would of itself suspend the operation of the law; and at the same time the tribunal would be in a position to recommend to the legislature further legislation on the same subject.

Whether by this road the act is ultimately referred to the people will be a simple question of direct legislation, and will depend upon the general law in force in the state in question in regard to initiative and referendum.[56] In whatever form, however, the final legislative action takes place, the measure will first have been presented and debated before a body of experts, and the facts will have been investigated in an authentic manner. In this class of cases, where legislation of so important a nature is to take place, the utmost precaution should be taken. Legislative action, whether direct or delegated, requires aids to facts no less than do the courts, and the complexities of modern legislation are often inadequately dealt with even by representative bodies, because of inadequate consideration and analysis of the facts. Still more necessary, with

[56] Nothing in the present proposition is in any respect inconsistent with obtaining a popular vote as speedily as under Colonel Roosevelt's proposition. While the responsibility for certain matters heretofore entrusted to the courts is shifted to a new body, the decisions of that body will serve as readily as preliminaries to a popular vote as would the decisions by the courts. So far as the present proposition relates to the future status of the law in question, its main object, after shifting the burden of certain decisions to a differently constituted tribunal, is, in case of a decision adverse to a particular law, to suspend the law until there has been another fiat on the part of the legislative authority of the state. The further question whether that fiat shall take the form of an act of the legislature or a vote of the people should depend, not upon some provision peculiar to the subject now under discussion, except perhaps in the case of peculiarly malignant local symptoms such as appear to exist in the state of New York, but upon the general law of the state in question with respect to initiative and referendum; and if the law of the state permits the initiative and referendum, the subsidiary question, whether decisions of the new body should first be reported to the legislature, or whether they may serve as a basis for an immediate popular vote, would be a matter to be solved by local experts on direct legislation.

the growth of modern direct legislation, must be improved provision for the presentation, consideration, and publication of the facts.

By this method, it is believed, findings of fact will be placed beyond question in their proper position with relation to the law itself. The findings of fact by the new tribunal, whether public or private, will be in no sense parts of the constitution, but merely records of the material facts relating to the law in question, and authoritative, as bearing upon future similar questions, only as a reliable scientific work is authoritative.

Three other important points will be gained. The courts will be relieved of the position, ignominious at least in appearance, of having their judicial mandates converted into mere temporary checks upon hasty legislative action, or subjected to popular review and reversal. The tribunal of public facts will be a body of a political nature, closely connected with and accountable to the legislative department. And finally, the courts will be relieved of the opprobrium attending the decision of essentially political questions in which popular feeling often runs high, much as they are now relieved by the jury of the burden of deciding the guilt or innocence of a human being accused of murder.

Whether this method would be a final solution of the present difficulties cannot be foretold. Doubtless there are other general constitutional provisions involving the determination of public facts which also might well be referred to the new tribunal.[57] All that is claimed for this suggestion is that it furnishes a possible remedy for the evils in the body politic which now appear to be malignant.[58]

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[57] Notably questions of eminent domain and taxation, as to whether the purpose is a public one; and questions of the equal protection of laws, as to whether or not an arbitrary classification has been made.

[58] Upon the remedy suggested in the text the changes may be rung almost *ad infinitum*.

A tribunal of fact might be provided merely for the particular case. But the dual aspect of the decision, as validating or invalidating the law itself, can hardly be avoided, and it seems better to recognize it frankly.

It might be provided that the new tribunal should determine the facts merely for the particular law in question, and that the facts so determined should have their proper place merely as findings of fact, like the verdict of a jury, and should not affect the validity of subsequent laws, either in the same or in some other form. But in that case a law in the same form might have to be reëxamined and perhaps again

It must be remembered, moreover, that the Fourteenth Amendment to the Constitution of the United States contains substantially the same due process of law provision, which must still be finally passed upon by the Supreme Court of the United States.

The proposed method will merely serve to prevent the state courts from attaching some peculiar significance to the phrasing of the state constitution, and thus leaving no federal question in the case.

Under the United States Constitution a decision by the state court upholding a law, upon certificate by the new tribunal, would probably be held to be due process of law, although the decision of that body upon the questions referred to it would have to be capable of review by the Supreme Court of the United States, if the federal Constitution were involved, and for this purpose its proceedings should be given a quasi-judicial character. The Supreme Court of the United States has said:

"We know of no provision in the federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process." [59]

A law disapproved by the new tribunal, and subsequently validated by the legislature, would doubtless have to be reëxamined if

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rejected; and in view of what has been said as to the feasible limits of constitutional checks upon legislation it has seemed doubtful whether, in case of difference of opinion between a tribunal and the legislature upon matters of fact of the character under consideration, the tribunal can do more than merely suspend the law. This form of remedy, however, would be well worth a trial if it is not desired to go farther.

Perhaps the most logical, and at the same time most comprehensive, remedy would be to provide that in no ordinary case should the courts refuse to recognize any act of the legislature which has not been invalidated by a proceeding *in rem*, but to provide that they might suspend the case to enable such proceedings to be brought, and further to provide special proceedings by which, after notice to the Attorney-General and all other persons interested, giving them an opportunity to be heard, a law might be permanently validated or invalidated. See Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 227 (1908). Upon these special proceedings the courts would finally determine the case in pure matters of construction, declaring the law valid or invalid; but in matters dealing purely with questions of public fact of the class considered in the text, the case would be transferred to the new tribunal, which should have only the power to suspend. The remedy suggested in the text, however, seems to preserve most of the advantages of this last remedy; and I have adopted it as most nearly approximating that other remedy which is the subject of discussion.

[59] Reetz *v.* Michigan, 188 U. S. 505, 507 (1903).

again attacked under the federal Constitution, even though so far as the state constitution is concerned it is valid for all time.

It should be added that in case a state law is held invalid by a state court solely under the federal Constitution, Congress would do well to provide more fully for an appeal to the Supreme Court of the United States.[60]

One word in conclusion. The foregoing suggestions are offered in a purely tentative manner; and, if in any measure they stimulate on the part of members of the bar further consideration of ways and means for curing what I conceive to be a real and substantial defect in the existing system of constitutional law, their purpose will have been accomplished.

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[60] Cases like Missouri *v.* Andriano, 138 U. S. 496 (1891), would be likely to give trouble in case the state attempted to appeal. In case of an appeal by an ordinary party to a civil case, cases like Nutt *v.* Knut, 200 U. S. 12 (1906), would govern.